MJH SDN. BHD.

v.

JURONG GRANITE INDUSTRIES SDN. BHD

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG JC
[CIVIL SUIT NO. 22-52-91]
15 AUGUST 1991

CIVIL PROCEDURE: *Defence not filed within time specified in Rules of the High Court - Failure of plaintiffs' solicitors to give defence 48 hours notice - Does not affect right to default judgment - Defence must be taken cognizance of although irregular - Merits - Rules of the High Court 1980, O. 19 rr. 4, 7.*

On 5 March 1991, the plaintiffs filed a writ against the defendants claiming for the return of their crushing plant and other equipment. On 20 March 1991, the plaintiffs obtained an interim injunction restraining the defendants from removing or dealing with the said plant. On 6 May 1991, the defendants filed their memorandum of appearance. Since the defendants failed to enter their defence, on 27 June 1991 the plaintiffs applied to enter judgment under O. 19 r. 7 of the Rules of the High Court 1980 (RHC). On 15 July 1991 without leave of the Court, the defendants filed their defence.

The defence contends that since there is a defence filed, the Court must take cognizance of the merits therein, notwithstanding the failure to file the defence within the stipulated time period.

Held:

[1] The plaintiffs did not comply with the Legal Profession (Practice and Etiquette) Rules 1978 (the Rules) as they did not give the defendants 48 hours notice to file their defence. However, failure to comply with the Rules does not affect the plaintiffs' application to enter a default judgment. Such breach of etiquette will have to be dealt by the relevant Bar Committee or Bar Council.

[2] The plaintiffs' application was made under the wrong rule as their claim is in detinue relating to the detention of movable property now in the possession of the plaintiffs. This type of situation is covered under O. 19 r. 4. Since the plaintiffs have made an erroneous application, it cannot be entertained by the Court.

[3] Default judgments are obtained due to non-compliance of the RHC and not where the Court has had a chance to hear the merits of the case and to consider all relevant points. Therefore, when there are merits or a *prima facie* case in the defence, the Court should grant to the defendants, an opportunity to defend themselves rather than denying them.

[4] From the materials disclosed in the defence and the plaintiffs' statement of claim, the Court finds that the defence contains meritable ingredients of a substantial and creditable nature, for which a trial is necessary.

[Plaintiffs' application dismissed; costs to be borne by defendants.]

Cases referred to:

Asia Commercial Finance (M) Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1988] 1 MLJ 33 ***(cit)***
Gibbings v. Strong [1984] 26 Ch D 66 ***(foll)***
Idris bin Haji Salleh v. Federal Auto Holdings Bhd [1979] 2 MLJ 141 ***(refd)***
Phillip Securites (Pte) v. Wong Ah Heng [1987] CLJ (Rep) 830 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 19 rr. 4, 7

For the applicant/plaintiff - Pathma
For the respondents/defendants - Michael Chong

JUDGMENT

James Foong JC:

This is an application of the plaintiffs to enter judgment against the defendants under O. 19 r. 7 of the Rules of the High Court (hereafter shall be referred to as the High Court Rules), due to the default of the defendants in filing their defence not within the period as specified under the High Court Rules.

The brief facts of this case are as follows.

On 5 March 1991, the plaintiffs filed in the High Court at Johore Bahru a writ of summons, wherein they claimed against the defendants for the return of their crushing plant and other equipment (hereinafter jointly referred as the plant), alleged to be taken by the defendants, together with damages and costs.

On 20 March 1991, the plaintiffs obtained an interim injunction from this Court against the defendants restraining them and/or their servants and/or agents from *inter alia* removing and/or dealing with and/or using the said plant presently at a certain premises.

On 30 April 1991, the writ of summons and the order for the aforesaid interim injunction were served on the defendants.

On 6 May 1991, the defendants filed a Memorandum of Appearance with this Court.

On 27 June 1991, as no defence was filed by the defendants, the plaintiffs filed this application to enter judgment against the defendants for default of defence.

On 15 July 1991, without leave, the defendants filed with this Court, a statement of defence.

At the hearing of this application, the plaintiffs Counsel stressed that the defendants have breached the High Court Rules by not filing their defence within the stipulated period of 14 days from date of entering appearance. As such the plaintiffs are entitled under O. 19 r. 7 of the High Court Rules for judgment to be entered against the defendants.

The defence Counsel readily admitted that it was the defendants' solicitors neglect and oversight that caused the defence to be filed out of time. However, as there is a defence filed, consideration must be given to the defence and, judgment should not be entered against the defendants.

During the course of the hearing of this application, this Court enquired whether the plaintiffs Counsel did comply with Legal Profession (Practice and Etiquette) Rules 1978, in giving the defendants 48 hours notice to file their defence. To this, the plaintiffs' solicitors replied in negative. He asserted that there was no necessity for such a notice in this type of matter since, the plaintiffs were making a formal application to this Court to enter a default judgment.

After careful consideration of the authorities cited, this Court finds that though there may be a failure to comply with the Legal Profession (Practice and Etiquette) Rules, such irregularities do not affect this application of the plaintiffs. Breach of etiquette by any solicitors will however be dealt with by the relevant Bar Committee or the Bar Council - See the case of *Phillip Securities (Pte) v. Wong Ah Heng* [1987] CLJ (Rep) 830 and *Asia Commercial Finance (M) Bhd v. Bank Bumiputra Malaysia Bhd. & Ors* [1988] 1 MLJ 33.

With the aforesaid point being dealt with, this Court proceeded to examine the plaintiffs' application which is made under O. 19 r. 7 of the High Court Rules. Upon careful perusal, this Court finds that the plaintiffs' application is made under a wrong rule.

The plaintiffs' application are for the following orders (which are similar to that of the statement of claim) that:

(i) the plaintiffs be authorised to repossess all their crushing plant and equipment taken by the defendants and presently at Jabatan Kerja Raya Quarry, Jalan Tanjung, Labu, Batu Dua, Batu Pahat;

(ii) damages to be assessed;

(iii) costs

Reading these prayers with the contents of the statement of claim, this Court finds that the plaintiff's claim is in detinue relating to the detention of movable property now in the possession of the plaintiffs. This seems to be exactly the type of situation so provided under O. 19 r. 4.

Order 19 r. 4 clearly states as follows:

> Where the plaintiff's claim against a defendant relates to the detention of movable property only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter either:
>
> (a) interlocutory judgment against that defendant for the delivery of the property or their value to be assessed and costs; or
>
> (b) interlocutory judgment for the value of the property to be assessed and costs, and proceed with the action against the other defendants, if any.

As a specific rule has been allotted to a particular type of situation, the plaintiffs must adhere to that rule in making their application to this Court. In fact, O. 19 r. 7 expressly declares that r. 7 can only be used in a claim of a description not mentioned in O.19 r. 2 to 5. Since the plaintiffs' claim is of a description specifically mentioned in O. 19 r. 4, the plaintiffs have obviously made an erroneous application and as such cannot be entertained by this Court.

Now, touching on the next point of contention of the assertion of the defence Counsel, that since there is a defence filed, the Court must take cognizance of the merits therein. If there are merits in the defence then judgment in default of defence should not be granted.

After considering the relevant authorities, this Court is in full agreement with the views expressed by Earl of Selborne L.C. in *Gibbings v. Strong* [1984] 26 Ch D 66, where he stated as follows:

> ... and if a defence has been put in, though irregularly, I think the Court would do right in attending to what it contains. If it were found to contain nothing, which, if proved, would be material by way of defence, the Court would disregard it. If, on the other hand, it discloses a substantial ground of defence, the Court will not take the circuitous course of giving a judgment without regard to it, and obliging the defendant to apply, under r. 14, to have that judgment set aside on terms, but will take steps to have the case properly tried on the merits.

This case was in fact followed by Syed Agil Barakbah J. (as he then was) in the case of *Idris bin Haji Salleh v. Federal Auto Holdings Bhd* [1979] 2 MLJ 141.

Default judgments are judgments obtained due to non-compliance of the High Court Rules. These are not judgments decisive where, the Court have a chance to hear the merits of the case and, thereafter to hand down its decisions after considering all relevant points. Therefore when there are merits or a *prima facie* case in the defence, the Court should grant to the defendants, an opportunity to defend themselves rather than denying them, due to non compliance of a rule. However this Court must stress that if the defence do not disclose any substantial and creditable ground of defence, the application of the applicant for default judgment of this nature should be granted.

The question therefore before this Court is whether the defence discloses any merits of a substantial and creditable nature or prima facie case in the defence.

The plaintiffs' claim is for repossession of the said plant so detained by the defendants and for damages. From the statement of claim, the plaintiffs alleged that an agreement dated 24 May 1990 between the plaintiffs and the defendants, was finalised relating to the purchase of the said plant. It is also not disputed that the defendants paid part of the purchase price which was a sum of RM50,000. The issue as contended by the defence is whether legal ownership of the said goods has passed under these circumstances. If so the plaintiffs are only entitled to claim for the balance of the purchase price and, for damages if there is a breach of the agreement; not for the return of the said goods.

Further the defendants denied breaching the said agreement and they alleged that it was with the plaintiffs' assistance and consent, after payment of the RM50,000, that the said plant was allowed to be removed to another premises. In addition the defendants also alleged that certain parts of the said plant were not delivered to them by the plaintiffs.

From the materials disclosed in the defence and those gathered from the statement of claim, this Court finds that the defence contains meritable ingredients of a substantial and creditable nature, that warrant a fair trial to be granted. Further, as no default judgment has yet been granted and, on reasons as stated aforesaid, this Court rules that the plaintiffs' application be dismissed.

As this application arose not out of the fault of the plaintiffs and is mainly due to the default of the defendants' solicitors personally, the cost of this application shall be borne and paid for by the defendants' solicitors personally to the plaintiffs.

Also found at [1991] 3 CLJ 2885